

***United States – Definitive Safeguard Measure on  
Imports of Circular Welded Carbon-Quality Line Pipe from Korea***

ORAL STATEMENT OF THE UNITED STATES  
AT THE FIRST MEETING OF THE PANEL WITH THE PARTIES  
11 April 2000

Mr. Chairman, Members of the Panel,

1. On behalf of the United States delegation, I would first like to thank you for giving us this opportunity to present our views. We will not attempt to summarize our submissions, or respond to each of the arguments raised by Korea. Instead, we will focus on six main points. First, we will show that Korea's arbitrary break-out of the import trend statistics used by the USITC cannot detract from the USITC's conclusion that imports increased, both absolutely and relative to domestic production. Second, we will summarize the data before the USITC, which showed serious injury in the worsening of almost every single aspect of the U.S. line pipe industry's performance over the course of the investigation, with conditions reaching their lowest point at the end. Third, we will show that the increase in imports coincided with the decline in the domestic industry's performance, that other evidence further demonstrates the link between increased imports and serious injury, and that the USITC ensured that the effects of other factors affecting industry performance were not attributed to increased imports. As our fourth point, we will show that the United States applied its measure only to the extent necessary to remedy serious injury and facilitate the adjustment of the domestic industry. Fifth, we will explain why the rules for applying quotas under GATT 1994 and the Safeguards Agreement are inapplicable to the line pipe safeguard, which is not a quota. Sixth, we will respond briefly to Korea's arguments regarding the exclusion of our NAFTA partners.

### ***Increased Imports***

2. It is important to understand that there was an increase in imports in this case that was “sudden and recent.”

- The period of investigation in this case covered the five year period from 1994 through 1998, and the first six months of 1999. The USITC examined partial year data, identified here as the interim periods in 1998 and 1999, so that it would have the most recent information regarding the imports, the domestic industry, and all other relevant factors. The USITC routinely considers partial year data in addition to full year data whenever the timing of the initiation of an investigation permits the collection of such additional information.
- In this case, imports of line pipe increased on *both* an absolute *and* a relative basis. On an absolute basis, imports of line pipe increased in each of the last three years of the period investigated. After a slight increase from 1995 to 1996, imports grew rapidly – from 127,000 tons in 1996, to 222,000 ton in 1997, to 331,000 tons in 1998.<sup>1</sup>
- Imports declined somewhat in interim 1999 (the first six months of 1999), as compared with interim 1998 (the first six months of 1998), but only on an absolute basis. Moreover, imports remained at such high levels in interim 1999 that they exceeded whole-year imports in both 1995 and 1996.

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<sup>1</sup>USITC Report, p. C-4, Table C-1.

- Imports relative to domestic production followed a similar pattern to absolute import levels, except that there was no decline over the interim periods. On a relative basis imports reached their highest level in interim 1999, when they accounted for 46 percent of the U.S. line pipe industry's production.
- The USITC paid particular attention to the most recent part of the period of investigation. It noted that imports "rose sharply" in 1998 on an absolute basis, and that imports on a relative basis reached their highest level in interim 1999.<sup>2</sup>

3. Under the SGA an increase in either absolute or relative import levels would suffice – in this case we have both.

4. Korea tries to avoid this clear evidence of a sudden and recent increase in imports by devising its own limited period for measuring imports. By asking the Panel to focus only on the last six months of 1998 and the first six months of 1999, Korea would have the Panel examine a small portion of the import data in a certain way, and ignore the rest of it.

5. It is also important to note that Korea can only show a decline in imports in the last six months of 1998 and first six months of 1999 if it examines this period in six-month increments. If the import data for these 12 months are examined in different increments – for example, on a monthly basis, there is no steady decline in imports. As the USITC noted, monthly import levels in May and June of 1999 returned to the high levels seen in 1998.

6. The USITC followed its longstanding practice in this case and collected data to allow it to make year-to-year comparisons. The USITC customarily gathers and evaluates import data on a

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<sup>2</sup>USITC Report, P. I-14.

calendar year basis with extra data on interim periods, and not on the basis of arbitrarily defined snapshots of time.

- The use of interim-period-to-interim-period comparisons for 1998 and 1999 was consistent with its long-standing practice and, unlike Korea's proposed alternative methodology, was not chosen to achieve a particular result.
- The USITC avoids comparisons of "mismatched" interim periods because of the potential for distortions because of seasonal changes in market conditions.
- The USITC followed its longstanding approach in examining increased imports. This demonstrates neutrality and lack of bias in its analysis.

7. Korea relies to a great extent on the Appellate Body's decision in *Argentina–Footwear*.

But that case does not support its argument.

- First, it is important to realize that the facts here are much different from those in *Argentina- Footwear*. In that case, imports declined continuously, both in absolute and relative terms, for three years before the safeguard measure was imposed. In this case, imports *increased* continuously, and by large amounts, for the two complete years before imposition of the safeguard measure.
- The Appellate Body did not specify in *Argentina-Footwear* what period would qualify as "recent." It suggested, however, that the investigation period must be long enough for the competent authorities to identify trends.
- The USITC's decision is consistent with this approach. Although the USITC's investigation covered a 5 ½ year period, the USITC clearly paid special attention to the most recent import levels and trends, those in 1997, 1998 and in interim

1999.

- Korea's method of breaking out annual import data in such a way as to capture a brief and slight decline in imports is as arbitrary and results-oriented as the end-point-to-end-point comparison that the Panel found to be unacceptable in *Argentina-Footwear*.

8. Korea has failed to show, as a matter of law, that the period it proposed for assessing increased imports is mandated by the SGA or by Appellate Body and panel decisions interpreting the Agreement. It also has failed, as a factual matter, to show that there was not an absolute or relative increase in imports, based on the USITC's traditional and objective method of collecting import data. In short, Korea has failed to meet its burden of making a *prima facie* case that the increase in imports required by Articles 2.1 and 4.2 of the SGA did not occur.

### ***Serious Injury***

9. In assessing whether increased imports caused serious injury to the domestic industry, the USITC examined all of the factors set out in Article 4.2(a) and certain "other" objective and quantifiable factors that it found to be relevant. The evidence of a significant overall impairment in the US line pipe industry's condition beginning in 1998 was overwhelming.

- Domestic **production** declined from 882,00 tons in 1997 to 670,000 tons in 1998, and also fell in interim 1999 as compared with interim 1998.<sup>3</sup>
- The domestic industry's **capacity utilization** rate fell from 74.0 percent in 1997 to 58.9 percent in 1998, and from 62.9 percent in interim 1998 to 39.8 percent in

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<sup>3</sup> USITC Report, p. I-16.

interim1999.<sup>4</sup>

- Domestic **sales** declined from 838,000 tons in 1997 to 728,000 tons in 1998, and also fell in interim1999 as compared with interim 1998.<sup>5</sup>
- The domestic industry's **market share** declined from 77.3 percent in 1997 to 65.9 percent in 1998, and also fell in interim1999 as compared with interim 1998 (These are public data, which follow the same trend as the confidential information.)<sup>6</sup>
- The domestic industry's **financial performance** worsened in 1998 and interim 1999. In 1998, five of the 14 domestic firms operated at a loss in their line pipe operations, and five additional firms had reduced operating incomes. In interim 1999, all 14 firms had reduced operating incomes, and ten of the 14 firms operated at a loss, compared with interim 1998. This was in marked contrast to the domestic industry's financial performance in 1995 through 1997, when the industry as a whole was more profitable, and fewer or no producers operated at a loss.<sup>7</sup>
- The domestic industry's **ratio of operating income to net sales** declined from 8.1 percent in 1997 to 2.9 percent in 1998, and from 6.7 percent in interim 1998 to

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<sup>4</sup> USITC Report, p. I-17.

<sup>5</sup> USITC Report, p. I-17.

<sup>6</sup> USITC Report, p. C-3, Table C-1.

<sup>7</sup> USITC Report, p. I-18.

negative 11.4 percent in interim 1999.<sup>8</sup>

- All **employment-related indicators** -- the number of workers, hours worked, and wages paid -- fell sharply in 1998 and in interim 1999, as compared with interim 1998.<sup>9</sup>
- The **ratio of inventories to domestic production** rose from 9.7 percent in interim 1998 to 14.1 percent in interim 1999.<sup>10</sup>
- **Research and development** expenditures by the domestic industry fell each year, and were at their lowest level in 1998.<sup>11</sup>

10. All of these factors that I have mentioned underscore the serious injury which the U.S. line pipe industry experienced in 1998 and early 1999.

11. Korea ignores most of these indicators of serious injury. The arguments that it does raise do not withstand scrutiny. Moreover, these arguments would require the Panel to conduct a *de novo* review of the question of serious injury, something this Panel is not called upon to do. For example, Korea maintains that the U.S. line pipe industry cannot have been seriously injured, merely because the industry's capital expenditures increased.<sup>12</sup> But, as the USITC explained,<sup>13</sup> the time lag between when capital spending decisions are made and the actual outlays is so long

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<sup>8</sup> USITC Report, p. I-19.

<sup>9</sup> USITC Report, p. I-19.

<sup>10</sup> USITC Report, p. I-20.

<sup>11</sup> USITC Report, p. I-20.

<sup>12</sup> Korea's First Written Submission, para. 190.

<sup>13</sup> USITC Report, p. I-20 n.122.

in the pipe industry that this factor does not detract from the extensive evidence of serious injury.

12. Korea's claims that the line pipe industry's performance indicators were affected by declining OCTG sales because the drop in OCTG sales led to a disproportionate share of fixed costs being allocated to line pipe. Korea's argument does not hold up to scrutiny, for the following reasons:

- First, it is important to recognize that Korea presents absolutely no evidence that other pipe products distorted line pipe data for the large majority of the factors considered by the USITC. The only alleged distortion relates to two factors – capacity utilization and profitability.<sup>14</sup>
- The USITC recognized that the capacity utilization might not be as certain a measure of injury in this industry as in others, because of the ability of firms to shift production among various pipe products, and it assigned less weight to this factor.
- As to profitability, Korea's argument rests on two false assumptions: (1) that the largest component of average unit costs for line pipe consists of fixed costs; and (2) that these costs were disproportionately allocated to line pipe because OCTG sales fell to a much greater extent than line pipe sales. Both of these assumptions are untrue.
- Korea's argument assumes that the largest component of average unit costs for line pipe consisted of fixed costs. The majority of average unit costs -- raw

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<sup>14</sup>Korea's First Written Submission, para. 226.



material and direct labor -- were in fact variable and therefore could not be directly influenced by changes in production volume. Thus, even if there had been a disproportionately large decline in OCTG sales – and the record evidence is directly to the contrary – the effect that this could have had on average unit costs for line pipe was nominal.

- Korea's *only* evidence for the proposition that OCTG sales fell disproportionately is a statement by the one Commissioner who made a negative finding that net shipments of welded OCTG products "collapsed altogether between September 1998 and March 1999."<sup>15</sup> The Commissioner based this statement on data in an USITC staff memorandum.<sup>16</sup> But, the data in this memorandum show that line pipe shipments declined sharply too, at the same time and virtually to the same degree as OCTG shipments, in late 1998 and early 1999. OCTG shipments stayed at depressed levels for only two or three months longer than line pipe shipments, but the two products showed similar and nearly simultaneous trends. We are hard pressed to understand how Korea's Exhibit 48C (which purports to address this point) was compiled, but we draw the Panel's attention to the charts with AISI data for line pipe and OCTG sales in U.S. Exhibit 3. These clearly show that the movements in line pipe and OCTG sales were very similar and occurred at the same time.

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<sup>15</sup>USITC Report, p. I-69 n.67

<sup>16</sup>INV-W-247.

- Some allocation issues will always be present in a safeguards investigation involving a product that is made in productive facilities also used to produce other products. The fact that certain allocations are necessary does not imply that a Member has failed to evaluate industry-specific factors “of an objective and quantifiable nature,” as required by Article 4.2(a) of the SGA.

13. Another way in which Korea tries to evade the overwhelming evidence of serious injury is by arguing that the US line pipe industry was improving at the end of the period examined.

Korea is wrong as a factual matter:

- It mischaracterizes the import data by claiming that there was “a continuing decline in imports” at the very end of the period. This was not so. Imports in May and June 1999 had risen again to the very high monthly levels of 1998.
- It relies on announcements of price increases that were mostly made in “late 1999 and early 2000” after the USITC injury investigation was finished, and which are not part of the record before the USITC or this Panel.

14. The evidence of serious injury was extensive and Korea has failed to make a *prima facie* case that the US line pipe industry was not seriously injured.

### ***Causation***

15. The USITC’s causation analysis was fully consistent with Art. 4.2 of the SGA and the Appellate Body’s decision in *Wheat Gluten*. The USITC examined the effects of the increased imports, and the effects of other relevant factors, on the domestic industry. By examining and then weighing these effects separately, the USITC distinguished between the effects of increased imports and the effects of other factors, thus ensuring that the effects of other factors were not

attributed to the imports.

16. Turning first to the effects of the increased imports, the USITC found that imports had increased substantially every year since 1996, and that the bulk of this increase occurred in 1997 and 1998. Based on its evaluation of the import levels and industry indicators, the USITC found that the surge in imports and consequent shift in market share from the domestic product to imports occurred at the same time that the domestic industry went from healthy performance to a very poor performance.

17. The USITC found that increased imports, together with the import-led price declines, caused domestic producers to lose significant sales, market share, and revenue. This led to declines in other key indicators, such as production, shipments, employment, and operating income.

18. Through this analysis, the USITC found that increased imports were an important cause of serious injury and properly established the existence of the causal link between the increased imports and the serious injury, as required by Art. 4.2 of the SGA.

19. Korea claims that imports reached their highest level in the first half of 1998, and that the deterioration of the domestic industry did not begin until the second half of 1998. Thus, Korea claims that there was no coincidence in trends between imports and the downturn in the line pipe industry's performance. Korea is wrong.

- It is not necessary for increased imports and a deterioration in the industry's condition to occur simultaneously for there to be a causal link between the two. A short lag between cause and effect is to be expected.
- The Panel should also note that Korea's assertion that the increase in imports and

the downturn in the U.S. line pipe industry's performance did not coincide is incorrect. If we examine the second half of 1998 in smaller increments -- in quarters -- we see that the absolute decline in imports occurred only in the fourth quarter.<sup>17</sup> Imports during the third quarter were higher than in any other quarter in the entire five-and-a-half year period of investigation. In other words, there *was* a coincidence between high imports in the third quarter of 1998 and the deterioration in the industry's condition.

- Korea fails to meet the burden of proof because its proposed "tailored" period has no priority over other approaches yielding contrary results.

20. Korea also tries to negate the obvious effects of increased imports in this case by claiming that import levels were overstated because some imports from Korea were "dual stenciled" (that is, pipe that is marked as conforming to both line pipe and standard pipe specifications<sup>18</sup>) and actually used as standard pipe. Article 4.2(a) of the SGA requires that competent authorities "evaluate all relevant factors *of an objective and quantifiable* nature having a bearing on the situation of that industry." The Korean respondents had ample opportunity, pursuant to Article 3.1 of the SGA, to present quantifiable evidence to the USITC as to the extent to which imports from Korea of dual stenciled line pipe were used in standard pipe applications, but they failed to do so.

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<sup>17</sup>See INV-W-247, table entitled "U.S. Imports of carbon steel line pipe, 16 inches and under in diameter, by quarter, 1994-1999."

<sup>18</sup>Pipe that is made to the specifications of the American Petroleum Institute for use in oil and gas pipelines is automatically also in conformance with the less restrictive specifications for standard pipe. See USITC Report, p. II-6.

21. The USITC found that the evidence developed in its investigation suggested that imports had significantly depressed domestic prices. The USITC had three different types of evidence for this: (i) average unit values of imports; (ii) quarterly pricing data which it collected, and (iii) questionnaire responses from a wide range of industry participants. All three of these categories of evidence pointed to the same result.

- After remaining relatively stable from 1994 through 1997, the average unit value of imports (the total value of imports divided by total volume) dropped by almost 10 percent in 1998, and by a further 24 percent in interim 1999 (compared with interim 1998).
- The quarterly pricing data which the USITC collected showed that underselling by imports was pervasive over the entire period of investigation; imports were priced below the domestic product in about 82 percent of all comparisons. The USITC also noted that, for five of the six products for which it had collected pricing data, imports from the largest import source of line pipe (Korea) undersold the domestic product in all four quarters of 1998 and the first two quarters of 1999, generally by double-digit percentages.
- The third category of evidence of price depression consisted of the questionnaire responses of line pipe industry participants. Most of the U.S. producers, importers and purchasers of line pipe identified import competition as a “very important” or “important” cause of injury and price declines.<sup>19</sup> The responses of importers and

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<sup>19</sup>USITC Report, p. I-25 and II-66-68, Tables 40-42.

purchasers of line pipe – who would be expected to have an interest in maintaining access to low-priced imports – are especially credible.

22. Korea’s critique of this evidence of price depression is unpersuasive.

- Korea does not take issue with the evidence of price depression based on the declining average unit values of imports during 1998 and interim 1999.
- Korea offers no evidence for its assertion that “the instances of underselling . . . did not increase over the period.”<sup>20</sup> In any event, this assertion is irrelevant as it would not negate the evidence that imports consistently undersold the domestic product and thus depressed prices.
- Korea’s attempts to dismiss the questionnaire responses of industry participants as “anecdotal” is especially unconvincing. These were questionnaire responses from entities that were in the best position to observe and evaluate the effects of imports on domestic prices -- importers and purchasers of line pipe. These entities would probably have been opposed to safeguards measures. Yet most of them identified import competition as an important cause of declining prices.

23. The USITC examined the effects of six factors, other than increased imports, as possible other causes of serious injury. In examining these other causal factors, the USITC distinguished the injurious effects of increased imports from the effects caused by these other factors. It examined whether increased imports were a “substantial cause” of serious injury. A “substantial cause” under U.S. law is “a cause which is important and not less than any other cause.” This

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<sup>20</sup>Korea’s First Written Submission, para. 280.

approach ensures consistency with the guidance on causation provided by the Appellate Body in *Wheat Gluten*. By examining all of the other factors in this way, the USITC identified the effects of these factors alone, therefore distinguishing those effects from the effects of imports, which were separately considered. Thus, the USITC ensured that it did not improperly attribute to imports any injurious effects caused by other causal factors. Through this process, the USITC also established that the causal link between the increased imports and the serious injury was genuine and substantial.

24. We will only address two other causal factors in detail here -- (i) declining demand for line pipe in the oil and gas sector; and (ii) competition among US line pipe producers. They are the only ones which Korea has raised.

25. The USITC recognized that the 1998/1999 oil and gas crisis resulted in declining demand for line pipe. However, there were several reasons why much of the deterioration in the condition of the line pipe industry could not be explained by the oil and gas crisis.<sup>21</sup>

- First, the US line pipe industry previously had operated at lower levels of demand without incurring the severe financial losses that it did in 1998 and the first part of 1999. The USITC noted that the most significant difference between previous periods of lower demand and the 1998/1999 period was the much greater presence of imports in the latter period.
- Second, reduced demand because of depressed oil and gas conditions could not account for the large shift in market share away from domestic line pipe to

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<sup>21</sup>USITC Report, pp. I-28-29.

imports.

- Third, declines in oil and gas production activity could not explain price declines in line pipe grades that were typically not sensitive to changes in oil and gas prices. The USITC found that demand for line pipe is most sensitive to changes in oil and gas prices when used for “gathering” (that is, the application closest to the wellhead), less sensitive when used for transmitting (that is, conveyance of oil and gas nationally and regionally), and least sensitive when used for distributing oil and gas (that is, conveyance of oil and gas at the local level to end users).<sup>22</sup> In this case, the price declines were across the whole range of line pipe products, even those for which demand was not very sensitive to declines in oil and gas production activity, indicating that something other than developments in the oil and gas production activity was responsible for the decline in the line pipe industry.
- Fourth, the USITC noted that most line pipe (over 90 percent) is used for natural gas applications, and that the declines in prices, production and drilling activity were much less severe for natural gas than for oil.
- Finally, there was a consensus among producers, importers and purchasers responding to the USITC’s questionnaires that imports had played a major role in the decline of line pipe prices in 1998 and interim 1999.

26. Turning to competition among domestic producers – the other causal factor on which

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<sup>22</sup>USITC Report, p. II-44.



Korea relies – the USITC found that this had always been a factor in the market, and could not explain the sudden and sharp declines in domestic prices and shipments in 1998 and the first part of 1999. There was no unusually large increase in domestic capacity over the period examined. In fact, the growth in capacity was much less than the growth in consumption in this period. In its Exhibit 48A Korea focuses only on excess capacity in interim 1999. But, as we have discussed, serious injury was evident in 1998, when excess capacity was at relatively low levels. (We also note that Korea's Exhibit 48A does not show what happened to imports at this time.) Thus, contrary to Korea's further assertion, the USITC did not improperly attribute to increased imports injury caused by either the oil and gas crisis or competition among domestic producers.

***Threat***

27. Korea's arguments challenging the determination of the two USITC Commissioners who found a threat of serious injury are based on a misstatement of the facts. For example,

- These Commissioners did *not* rely on a threat of increase in imports, as Korea alleges, but on an actual surge in imports.
- Korea claims that import volumes were declining in the second quarter of 1999. This was clearly not the case – monthly import levels had begun to increase again in May and June of 1999.

The determination of the two Commissioners finding threat was based on facts in the record before the USITC, not on mere allegation or conjecture, as Korea claims

28. Now we will make three additional points, the fourth, fifth, and sixth points of our presentation. We will begin by showing that the United States applied its measure only to the extent necessary to remedy serious injury and facilitate the adjustment of the domestic industry.

Then, we will explain why WTO rules applicable to quotas do not apply to the U.S. line pipe safeguard. Finally, we will explain why footnote 1 of the Safeguards Agreement must be read as applicable to free trade areas.

***Putting the safeguard measure in context***

29. We have already described the domestic industry's decline into uniformly poor financial performance, which led the USITC to conclude that the industry was in a state of serious injury. As we have also shown, increased imports were a cause of the domestic industry's decline. Some additional facts serve to put the line pipe safeguard into perspective. Korea accounted for 70 percent of the total increase in imports in 1998. Imports from Korea also increased in the first half of 1999, as compared with the same period of 1998, in spite of declining demand in the U.S. market. Korean line pipe was imported at exceptionally low prices – much lower than those charged by U.S. producers and most other import sources.<sup>23</sup>

30. These facts demonstrate that the United States complied with Article 5 of the Safeguards Agreement, in that it did not apply the safeguard measure “beyond the extent necessary.” It guaranteed imports a presence in the U.S. market, since the 9000 ton exemption for each country would allow a substantial quantity of line pipe into the United States with no supplemental duty. The supplemental duty itself – at 19 percent – was at a level commensurate with the decline in U.S. producers' prices in the first six months of 1999. The Panel should also note that even the addition of the 19 percent duty would not bring 1999 unit values for imports to their pre-1999 levels.

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<sup>23</sup>USITC Report, pp. I-82 - I-83.

31. In short, the line pipe measure was structured to create a situation in which the quantity and price of line pipe sold by domestic producers would increase to a point that their performance would allow the completion of their adjustment plans. However, any improvement would be commensurate with the serious injury, and not excessive.

***Korea has failed to establish that the measure was applied beyond the extent necessary***

32. We will now move to our fourth main point, that Korea has not presented any evidence relevant to determining whether the line pipe safeguard is “commensurate” with the goals of Article 5.1 – remedying serious injury and facilitating adjustment. This is the standard that the Appellate Body enunciated in *Korea – Dairy* for determining whether a Member has complied with the requirement in Article 5.1, first sentence, that “A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.”

33. This text, and its interpretation by the Appellate Body, establish that the condition of *the domestic industry* is the benchmark for the application of a safeguard measure. “The extent necessary” provides an outer limit on application, but it would clearly be permissible for a Member to apply a measure *less than* the extent necessary if it so chose.

34. It is also significant that the Safeguards Agreement places this limit on the extent to which a Member may “apply safeguard measures.” A safeguard measure typically has several components, including the type of measure (whether it is a quota, tariff, or TRQ), the level of the measure, its duration, and the particular products included. These components in combination determine the extent of the application of the measure. Since it is “measures,” and not the separate components of a measure, that must be commensurate with the goals of Article 5.1,

consistency with Article 5.1 can only be analyzed with reference to the measure as a whole.

35. Korea's arguments are simply nonresponsive to the relevant standard. It does not even attempt to address the line pipe safeguard in light of serious injury and the facilitation of adjustment. Instead, it compares the line pipe safeguard chosen by the United States with a TRQ that three USITC Commissioners found "will address the serious injury found to exist and be most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition."<sup>24</sup> Korea characterizes the line pipe safeguard as "more restrictive" than the measure recommended by the three Commissioners and extrapolates that the line pipe safeguard must accordingly be "excessive."

36. However, the fact that one potential safeguard measure falls within the Article 5.1 limit does not mean that changing the type, level, or duration of the measure would push it beyond the limit. This is because the level of restriction of imports – to take just one example – does not by itself indicate the extent to which the measure remedies serious injury or facilitates adjustment. The effect on the domestic industry will be determined by the interplay between the safeguard measure and market for the product in question. For example, suppose a four-year tariff of 30 percent was found to be commensurate with the goals of Article 5.1 because it would give the domestic industry the profits necessary to finance restructuring efforts to compete with imports. A 40 percent tariff might be able to achieve the same goal in three years. Both would be permissible under Article 5.1, first sentence. However, a comparison of the two would do nothing other than reveal that they were different.

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<sup>24</sup>USITC Report at I-5.

37. Korea also errs in its application of its faulty reasoning to the facts of this case because it does not consider the measure as a whole. It attempts to evaluate the relative restrictiveness of the recommended TRQ and the line pipe safeguard based primarily on one component – the quantity of imports shipped in 1998 that would be exempt from additional duties imposed in 2000. Korea ignores that the line pipe safeguard is one year shorter than the measure recommended by three Commissioners. It also ignores that the three USITC Commissioners judged that the 30 percent duty applied during the first year of their recommended measure was considered likely to prevent imports. In contrast, the 19 percent duty under the line pipe safeguard would not raise prices for Korean line pipe to the point where they were invariably higher than U.S. producers' prices. This is especially true in light of the U.S. producers' stated goal of increasing their prices to pre-surge levels.

38. In short, Korea fails in every respect to meet its burden of proof. It has not presented any evidence to indicate whether the line pipe safeguard is commensurate with the goals of Article 5.1. The analysis it does make, comparing the line pipe safeguard and the three Commissioners' recommended TRQ, addresses only isolated elements of the two measures. By ignoring important aspects of the line pipe safeguard, it fails to demonstrate anything about the measure as a whole and, thus, provides no basis to even apply the relevant standard. The Panel should, therefore, conclude that Korea has failed to put forth a *prima facie* case.

***Korea has failed to justify application of quota disciplines to the line pipe safeguard***

39. We will now move to our fifth point – that the principles of Article XIII of GATT 1994 that are incorporated into the Safeguards Agreement are the only provisions that are applicable to safeguard measures. The object and purpose of the Safeguards Agreement is to create a

“comprehensive agreement.” In so doing, it incorporates principles – and even one entire block of text – from GATT Article XIII. It omits the provisions of Article XIII that Korea now relies upon. To conclude now that Article XIII applies to safeguard measures would be to reverse the Members’ decision to include only some of those provisions in the Safeguards Agreement. The Panel simply does not have the mandate to rewrite the covered agreements in this fashion.

40. To understand the inapplicability of Article XIII to safeguard measures, it is useful to begin with GATT 1947. Under that agreement, Article XI placed a general ban on the use of quantitative restrictions, including quotas, and Article XIII regulated the application of quotas where they were permissible. The Article XIII rules also applied to TRQs, which were not covered by the Article XI ban.

41. Under GATT 1947, Article XIX set the conditions under which a contracting party could apply “emergency action” in the form of a temporary deviation from commitments like its Article II tariff bindings and the Article XI ban on quotas. If a contracting party chose a quota as its emergency action, the quota had to conform to Article XIII.

42. The WTO Agreement added the Safeguards Agreement to “clarify the disciplines” of the GATT 1994 on safeguards and create a “comprehensive agreement . . . based on the basic principles of GATT 1994.” This comprehensive agreement incorporated Article XIII:2(d) of GATT 1994 verbatim in Article 5.2(a) of the Safeguards Agreement. Other basic principles were included in somewhat revised form in Articles 2.2, 5.2(b), 8.1, 12.1, and 12.3 of the Safeguards Agreement. This by itself should eliminate any thought that Article XIII of GATT 1994 applies to safeguard measures under the WTO Agreement. To adopt provisions of Article XIII that were not included would undo what the drafters of the Safeguards Agreement did – something that is

not within the Panel's authority.

43. The omission that is most significant in this dispute is paragraph 5 of Article XIII of GATT 1994. The Article XIII rules expressly apply only to quotas. Paragraph 5 specifies that these rules also apply to TRQs. The Safeguards Agreement contains no comparable provision.

44. The logical conclusion is that where the Safeguards Agreement places a restriction on a quota, that restriction applies only to quotas and not to TRQs. Korea seeks to nullify this logic by arguing that a TRQ is in fact a quota because the level of the tariff depends on the volume of imports. For 50 years, first under GATT 1947 and then GATT 1994, TRQs were understood to be outside the Article XI ban on quotas precisely because they are not quotas. The text of Article XIII itself supports this understanding. If a TRQ were by its nature a quota, the separate provision for TRQs in paragraph 5 of Article XIII would be unnecessary. Such a result would violate an important corollary of rule of effectiveness in treaty interpretation – to avoid any interpretation that would render a provision of the treaty meaningless.

45. This conclusion also makes sense. A TRQ is nothing more than a two-stage tariff. Thus, it is fundamentally different from a quota in that it does not prohibit imports at any level.

46. Korea's arguments based on Article XIII of GATT 1994 fail for a similar reason. It is true that the Article XIII rules apply to TRQs. However, it is equally true that the Article XIII restrictions on TRQs were not incorporated into the Safeguards Agreement. If the Panel were to find that Article XIII applies to safeguard measures regardless of the terms of the Safeguards Agreement, it would negate the fact that the Safeguards Agreement includes only some of the provisions of Article XIII. In addition this interpretation would make Article 5.2(a) of the Safeguards Agreement redundant because it is essentially identical to Article XIII:2(d) of GATT

1994. This would violate basic rules of treaty interpretation. If Article XIII by itself applied to safeguard measures, there would have been no need to repeat the text of Article XIII:2(d) in this fashion. Thus, Korea cannot be correct in arguing that Article XIII applies to safeguard measures applied pursuant to the Safeguards Agreement and Article XIX of GATT 1994.

47. We will now address a sixth point, why the last sentence of footnote 1 of the Safeguards Agreement must be read as applying to free trade areas.

48. If the drafters had intended the last sentence of footnote 1 to be applicable only to a customs union, they would have cited only to subparagraph 8(a) of GATT 1994. We draw the Panel's attention to paragraph 8, which covers customs unions under subparagraph (a) and free trade agreements under subparagraph (b). Therefore, it is logical to conclude that the reference to the entire paragraph in the last sentence of footnote 1 means that provision applies to both customs unions and FTAs.

49. Korea argues that the location of the sentence does not make sense if it applies to free trade areas. We disagree. The first three sentences of footnote 1 deal with the basic question of the relationship between Article XXIV and the Safeguards Agreement, as applied to customs unions. When the drafters chose to address Article XXIV as it affects both customs unions and free trade areas, it made sense to put it with other provisions dealing with that topic. Similarly, the Appellate Body in *Argentina – Footwear* considered only the first three sentences, and not the last, so it never reached the question whether the last sentence applied to free trade areas.

50. Korea states that the United States referred to the last sentence of footnote 1 as a "separate" provision. We did not say that. In fact, that sentence is part of an overall discussion of the relationship between Article XXIV of GATT 1994 and the Safeguards Agreement.



51. Finally, we would point out that the Analytical Index to the GATT 1947 shows that there is a long dispute over whether customs union and FTA members may exclude each other from safeguards measures. If Korea's view is correct, the Members decided the issue in a footnote, took the radical step of reaching different conclusions for customs unions and free trade areas, and then omitted the specific citation – a citation to Article XXIV:8(a) – necessary to make that difference clear. That view makes no sense.

### ***Conclusion***

52. In closing, we thank you for agreeing to help us resolve this dispute, and for your attention this morning and this afternoon. We would be glad to answer any questions you may have on this presentation or our written submissions.

***United States – Definitive Safeguard Measure on  
Imports of Circular Welded Carbon-Quality Line Pipe from Korea***

STATEMENT OF THE UNITED STATES  
AT THE SECOND SESSION OF THE FIRST MEETING OF THE PANEL WITH THE PARTIES  
12 April 2000

1. Upon further review of Korea's arguments, it is apparent to the United States that Korea has not shown any need for the Panel to examine additional pricing data in order to determine the consistency of the USITC's determination with the Safeguards Agreement. To the extent that any comments in the United States' first submission suggest otherwise, we wish to correct the record as to the United States' view.
2. Korea's contention that the Panel needs to examine additional price information is mainly predicated on an isolated statement made in the dissenting views of Commissioner Crawford that underselling was not any more prevalent during 1998 and interim 1999 than in earlier periods. (USITC Report at I-71.) But, regarding the fact upon which the USITC actually relied with respect to prices--and the only fact about pricing the Panel arguably needs to review--even Commissioner Crawford specifically acknowledged that there was persistent and widespread underselling. She simply placed less emphasis on that fact.
3. From Commissioner Crawford's single statement (which is not part of the views of the competent authorities) Korea hypothecates that *if* the instances of underselling actually declined in the last phase of the period of investigation, then this possibility would call into question the finding by the USITC that declines in the prices for the domestic product resulted from the pricing of the imports of line pipe. We emphasize that Korea has failed to adduce any evidentiary support for *conjecture* regarding the *possibility* of fewer instances of underselling in the latter part of the period. Certainly, Commissioner Crawford's statement that instances of underselling did not increase does not in any way support Korea's supposition that instances of underselling declined. Korea has not proffered any other basis for its speculation.
4. Further, for the reasons stated in the first U.S. submission (paragraphs 137-143), the USITC's explanation of its conclusions demonstrates that the finding regarding price depression was entirely justified based on the pervasive underselling by the imports throughout the period of investigation (82 percent of all comparisons throughout the period of investigation showed underselling by the imports) as well as the information provided by purchasers that imports instigated the price declines. A careful reading of the exact passages in Korea's brief which form the basis for its request for additional pricing data shows that Korea is actually asking the Panel to draw, from the already available pricing data, different factual conclusions from those drawn by the USITC. Korea has no basis other than conjecture to assert that the Panel needs to conduct a review of information in the confidential record to ascertain whether Korea's unsupported allegations possess any merit.
5. We now provide a point-by-point review of Korea's basis for urging that pricing data from the confidential record is necessary for the Panel to review the claims raised in this dispute:

6. In paragraph 78 of its first submission, Korea identifies paragraphs 222 and 276-283 as its basis for requesting “price data trends between imports and domestic prices for each quarter contained at [confidential Report pages] II-88, 89-98, 103-110.” In paragraph 222, Korea simply cites to the USITC’s conclusion that import prices caused price declines and that pricing data therefore support a finding of serious injury; Korea suggests that this conclusion might not be adequate or reasonable because the sole dissenting Commissioner (whose views are not part of the competent authorities’ determination under SGA Art. 4.2) weighed the pricing data differently. Korea has not met its burden to show that, based upon the data that was supplied in the public Report, the USITC’s findings were not based on objective evidence or that the USITC did not otherwise comply with the Safeguards Agreement. Here, again we refer the Panel to paragraphs 137-143 of the U.S. first submission.

7. In paragraphs 276-283 of its Korea’s first submission, upon which Korea further rests its claim for additional pricing data, Korea again questions the finding that imports led prices down. After noting gratuitously that the Panel does not have access to the confidential pricing data, Korea notes that the USITC’s summary of the data seems to indicate that import and domestic prices moved in tandem. From this, Korea surmises that there was some independent cause of the price decline for both imports and domestic producers. However, the disclosure of confidential pricing data, which presumably could confirm whether the prices moved in tandem, is not relevant to Korea’s claim. The data provided in the public version of the USITC’s Report and the findings based on this data confirm Korea’s view that both imports and domestic prices followed similar price trends. Korea’s true argument here is that the USITC did not conclude, as Korea would have preferred it to, that corresponding trends in prices for both imports and domestic product prove that neither was responsible for those declines.

8. Korea next states that instances of underselling did not increase over the period of investigation and that both import and domestic product prices declined. However, the fact that prices for both declined does not mean that there was less underselling. In fact, the USITC found that underselling was prevalent throughout the period of investigation, and that imports from Korea undersold the comparable domestic product in 29 of 33 instances during 1998 and 1999.<sup>1</sup>

9. According to Korea, if imports had been causing price declines, it would be expected that import values would have declined first and incidences of underselling would have increased in the latter part of the period. Again, Korea has not shown a need for the Panel to examine additional data. Rather, Korea is asking the Panel to interfere with the USITC’s price depression finding, based on Korea’s speculative view of the expected “formula” for price depression.

10. In a final effort to convince the Panel of the need to obtain confidential pricing data,

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<sup>1</sup>See USITC Report at II-65, Table 39 and at I-25, n.157.

Korea raised an additional argument at yesterday's meeting. Korea quoted a statement it made in the post-hearing brief it submitted to the USITC during the administrative proceedings. The passage that Korea refers to addresses a disagreement among the interested parties in the administrative proceeding as to whether the size of the margins by which imports undersold domestic products increased during 1998. Again, Korea has not disputed the prevalence of underselling— the specific fact about prices that is relevant to the Commission's findings. The Commission did not mention or rely on any increases in the size of underselling margins as a basis for its finding that imports depressed domestic prices. Thus, Korea has failed to show that the Panel needs to see confidential data in order to review Korea's challenge to the Commission's findings and conclusions relating to pricing.

11. In summary, Korea's request is essentially based on erroneous legal and economic assumptions, not a demonstration that further information is necessary for the Panel to determine whether the USITC's determination was consistent with Article 4.2 of the Safeguards Agreement.